

1. Is claimant entitled to temporary partial disability compensation for the period December 9, 2003, through March 2, 2004, a period of 12 weeks?
2. What is the nature and extent of claimant's injury?

3. What is the appropriate date of accident for the purposes of calculating this award?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant worked for respondent as a hostess and waitress for several years. Her duties included working the cash register, seating customers, bussing tables, rolling silverware, dusting, mopping, vacuuming, clearing tables, boxing up bakery items and handling to go orders. Some activities were relatively light, but others required heavy lifting, including handling heavy plates and trays of drinks. Most of claimant's activities were performed while standing on her feet, and claimant rarely had an opportunity to take a break or sit down.

In 2002, claimant began experiencing problems with both hands and both feet. Her symptoms continued to worsen and included pain, swelling, cramping, and numbness and tingling, with the left hand being worse than the right. Claimant's foot symptoms caused her to limp and, at times, she had difficulty walking. Claimant reported her difficulties to her employer and was referred to respondent's workers compensation doctor for an examination.

Claimant was ultimately referred to board certified hand surgeon John B. Moore, IV, M.D., who first examined claimant on October 18, 2002. Claimant had already undergone an EMG which showed left cubital tunnel syndrome. Dr. Moore recommended a left cubital tunnel release which was performed on May 28, 2003. A right cubital tunnel release was then performed on July 24, 2003, with follow-up treatment including physical therapy. Claimant was found to be at maximum medical improvement as of March 2, 2004, and was released to return to work at that time. Claimant continued to have some subjective complaints, although Dr. Moore determined that there were no anatomical abnormalities present at the time of her release. He assessed claimant a 9 percent impairment to the body as a whole for the cubital tunnel syndrome, with this rating being based upon the fourth edition of the *AMA Guides*.<sup>1</sup>

Dr. Moore was provided a job task list prepared by vocational expert Michael Dreiling. Based upon Mr. Dreiling's list, Dr. Moore opined that claimant retained the ability to perform all the work tasks on that list.

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

On March 2, 2004, Dr. Moore provided light-duty restrictions to claimant, with no indication in the record that those restrictions were temporary or that they had ended as of the date of Dr. Moore's deposition.<sup>2</sup> Those restrictions included 5- to 10-pound lifting restrictions, with repetitive forceful gripping or pinching or repetitive movement to be limited to six repetitions per minute. Dr. Moore was then asked to go through the task list and apply his March 2, 2004 restrictions. In doing so, Dr. Moore concluded claimant had suffered a 50 percent task loss, with claimant unable to perform six out of the twelve tasks on the list.

While claimant was being treated by Dr. Moore, she was given specific restrictions, which respondent could not accommodate. Claimant worked through May 13, 2003. After her release by Dr. Moore, claimant was then returned to work on December 9, 2003, with modified duties being accommodated at that time so that claimant did not have to lift as many heavy items. Her duties at that time included running the cash register, seating people, wiping off tables and bringing drinks. Claimant did not lift any of the heavy trays and was not allowed to sit at first, even though she had been restricted from standing by Dr. Brian Healy, who was treating her for her foot problems. Dr. Healy had performed an endoscopic plantar fascial release on claimant's left heel on May 23, 2003, with the endoscopic plantar fascial release on the right being performed on July 15, 2003.

The ALJ, in the Award, determined that May 12, 2003, would be the date of accident, determining that this was claimant's last day worked before leaving work prior to surgery. However, according to claimant's testimony, she last worked on May 13, 2003, having worked the morning of May 13.<sup>3</sup> She then temporarily terminated her employment, pending the surgeries above described.

When claimant was returned to work in December 2003, her work hours were substantially reduced. Claimant testified she did not request this reduction and that she was not offered additional hours. However, respondent's representative Jacqueline S. Smith (respondent's general manager) testified that claimant was offered full-time employment but declined the full-time employment, giving the reason that full-time employment would cause her to lose certain food stamp or medical card benefits for herself and her son.

However, Exhibit 2 to Ms. Smith's deposition, a document prepared by Ms. Smith on May 5, 2004, indicates that claimant had reduced hours due to a decline in guest

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<sup>2</sup> Moore Depo. at 14.

<sup>3</sup> R.H. Trans. at 21.

count.<sup>4</sup> Ms. Smith explained that this document was prepared at claimant's request. Ms. Smith also testified that claimant's hours were reduced substantially on or about May 5, 2004. Prior to that time, claimant was scheduled to work full-time according to Ms. Smith's testimony. However, Exhibit 1, which covers the week of February 23, 2004, indicates that claimant's work that week included only two working days.<sup>5</sup>

Claimant was referred for an evaluation by her attorney to P. Brent Koprivica, M.D., board certified in emergency medicine and occupational medicine. Dr. Koprivica examined claimant on April 8, 2004, noting a history of plantar fasciitis and bilateral carpal tunnel syndrome, as well as depression, somatization, fibromyalgia, tuberculosis and psychological distress. He noted claimant's history of depression included multiple suicide attempts. Dr. Koprivica was aware of claimant's surgery to her upper extremities performed by Dr. Moore and the surgeries performed to her lower extremities by Dr. Healy. He acknowledged claimant's current symptoms involve somatization disorder due to a psychological overlay, bilateral cubital tunnel syndrome and chronic pain syndrome, as well as the conditions for which claimant underwent surgery. He assessed claimant a 33 percent impairment to the body as a whole to the upper extremities, with the lower extremities being assessed a 15 percent impairment to the body as a whole, which combine for an overall 43 percent whole person impairment based upon the fourth edition of the *AMA Guides*.<sup>6</sup>

Dr. Koprivica was provided a copy of Mr. Dreiling's task list and found claimant incapable of performing nine of the twelve tasks, for a 75 percent task loss.

In workers compensation litigation, the burden of proof is upon the claimant to prove her entitlement to benefits by a preponderance of the credible evidence.<sup>7</sup>

The ALJ determined that claimant's date of accident was May 12, 2003, which he determined to be the last day claimant worked before surgery. However, claimant's testimony at regular hearing indicates that she worked May 13, 2003. The Board will, therefore, modify the award to show May 13, 2003, as the date of accident.

Claimant requests compensation for temporary partial disability compensation for the period December 9, 2003, through March 2, 2004, at which time claimant was found to be at maximum medical improvement. The evidence presented indicates that claimant

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<sup>4</sup> Smith Depo., Ex. 2.

<sup>5</sup> Smith Depo., Ex. 1.

<sup>6</sup> *AMA Guides* (4th ed.).

<sup>7</sup> K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

was returned to work, with the dispute centering around whether claimant was offered full-time work or whether the reduction to part-time work was as a result of a decline in guest count or at claimant's specific request. The ALJ found claimant to lack credibility regarding the explanation surrounding her reduced hours. The Board, in comparing the testimony of claimant to that of Jacqueline S. Smith, finds claimant to be the more credible witness. Ms. Smith's testimony that claimant was offered full-time work is directly contradicted by Exhibit 2, a document prepared by Ms. Smith, which indicates claimant's reduction in hours was due to a decline in guest count. Ms. Smith's explanation that this reduction was at claimant's request lacks credibility. Claimant worked for many years prior to her accident without requesting or apparently receiving the type of welfare benefits which respondent alleges was claimant's justification for these reduced hours. Additionally, Ms. Smith's testimony that claimant worked full-time through approximately May 5, 2004, when her hours were cut, is contradicted by Exhibit 1, which shows during the week of February 23, 2004, claimant was only scheduled to work two days. The additional weeks during that period were not provided for the ALJ's or the Board's review. Had there been sufficient evidence that claimant was working full-time through the May 5, 2004 reduction, the Board is confident respondent would have been capable of placing that evidence into the record.

With regard to the nature and extent of disability, the Board agrees with the determination by the ALJ that the opinion of Dr. Pratt, the court-ordered independent medical examiner, of an 18 percent impairment to the body as a whole is the most credible opinion in the record. Dr. Pratt, as an independent examiner, is intended to be unbiased and, in this situation, the Board finds his opinion to be persuasive. The Board, therefore, affirms the ALJ's determination that claimant suffered a permanent partial disability of 18 percent to the body as a whole as a result of the injuries suffered through May 13, 2003.

K.S.A. 44-510e defines permanent partial general disability as,

. . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

K.S.A. 44-510e must be read in light of *Foulk*<sup>8</sup> and *Copeland*.<sup>9</sup> In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .<sup>10</sup>

At the time of oral argument, the parties acknowledged that claimant's average weekly wage of \$178.83, post-award, is the appropriate average weekly wage to be utilized if it is determined that imputing a wage is appropriate under K.S.A. 44-510e.

In this instance, claimant was returned to work with specific restrictions by Dr. Moore. Those restrictions were not always observed by claimant or accommodated by respondent. Nevertheless, at some point in time, claimant's hours were reduced, with the controversy leading to the dispute as to why those hours were reduced. The Board found above that the credibility issue is to be determined in claimant's favor in this case as the questions generated by Exhibits 1 and 2 to the Smith deposition were not sufficiently explained to the Board's satisfaction. The Board finds that the reduction in claimant's hours were due to a decline in guest count as is noted on Exhibit 2, rather than at claimant's request.

The Board holds in this instance that claimant is not in violation of the policies set forth in *Foulk* as the loss of hours after claimant returned to work occurred as a result of actions taken on the part of respondent and did not constitute a lack of good faith on claimant's part. At the time of the regular hearing, claimant continued working for respondent, although part-time, but was being paid \$11 an hour. The Board finds claimant put forth a good faith effort to obtain post-injury employment and, therefore, rather than imputing a wage under K.S.A. 44-510e and *Copeland*, the Board will apply claimant's actual wages, which, as noted above, compute to \$178.83 per week, which when

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<sup>8</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

<sup>9</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>10</sup> *Id.* at 320.

compared to her original average weekly wage of \$478.55, results in a wage loss of 63 percent.

With regard to claimant's task loss, the Board finds the opinion of Dr. Koprivica to be the most credible. Dr. Moore initially found claimant to have no task loss. When pressed to use his own restrictions placed upon claimant as of March 2, 2004, when claimant was released to work, Dr. Moore acknowledged an elimination of six of the twelve tasks on Mr. Dreiling's list for a task loss of 50 percent. The Board questions Dr. Moore's opinion and, therefore, adopts the opinion of Dr. Koprivica that claimant has a 75 percent task loss. Pursuant to K.S.A. 44-510e, in averaging the 63 percent wage loss and the 75 percent task loss, the Board finds claimant has suffered a work disability of 69 percent for the injuries suffered through May 13, 2003.

The Board further finds that claimant's reduction in hours, as it was not done as a result of any bad faith on claimant's part, but rather a result of the actions of respondent, would entitle claimant to temporary partial disability compensation for the period December 9, 2003, to March 2, 2004. The evidence in the record supports an award of \$2,862.41 in temporary partial disability compensation. In computing the award, this calculates to 8.97 weeks temporary total disability compensation which number will be utilized in the final computations.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated November 15, 2004, should be, and is hereby, modified to award claimant a permanent partial general disability award of 69 percent to the body as a whole for injuries suffered on May 13, 2003, as well as temporary partial disability benefits in the amount of \$2,862.41 for the period December 9, 2003, through March 2, 2004. This is based upon an average weekly wage of \$478.55 and a post-injury wage of \$178.83.

Claimant is entitled to 38.97 weeks of temporary total disability compensation (including the modified temporary partial disability weeks) at the rate of \$319.05 per week totaling \$12,433.38, followed thereafter by 269.81 weeks of permanent partial general disability compensation at the rate of \$319.05 per week totaling \$86,082.88, for a total award of \$98,516.26.

As of June 6, 2005, claimant is entitled to 38.97 weeks of temporary total disability compensation at the rate of \$319.05 per week totaling \$12,433.38, followed thereafter by 68.89 weeks of permanent partial general disability compensation at the rate of \$319.05 per week totaling \$21,979.35, for a total due and owing of \$34,412.73, followed thereafter

by 200.92 weeks of permanent partial general disability compensation at the rate of \$319.05 per week until fully paid or further order of the Director.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael J. Haight, Attorney for Claimant  
John David Jurcyk, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director